Alto-Shaam, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 30–CA–11019

July 24, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On May 22, 1991, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this decision,[2] to modify the recommended remedy, and to adopt the recommended Order as modified.

The complaint alleges, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by twice terminating employee Kristeen Peckstein because of her union and other protected concerted activities. The judge found that the Respondent's first discharge of Peckstein was unlawful and ordered her reinstated with backpay from that date. The Respondent excepts. It contends that Peckstein's postdischarge threat against fellow employee Doreen Held during a July 6, 1990 visit to Held's home was sufficiently egregious to justify its refusal to reinstate Peckstein. We find merit in the Respondent's exception.

The relevant facts are as follows. In June 1989, the United Steelworkers of America (the Union) demanded the discharge of four employees, including Peckstein and employee Doreen Held, for nonpayment of dues. The Respondent refused. While the matter was pending before an arbitrator pursuant to the parties' collective-bargaining agreement, the Union commenced an economic strike against the Respondent on July 2, 1990.[3] Peckstein and the two other employees named in the Union's discharge demand[4] joined the strike and the picket line at the Respondent's facility. Held crossed the picket line and continued working.

At this point, the Respondent notified the Union that it intended to terminate Peckstein, Held, and the other two employees pursuant to the Union's June 1989 demand. The Union objected and requested that the Respondent await the arbitrator's decision before acting. Nonetheless, on July 3 the Respondent notified Peckstein and the two other employees that it was acceding to the Union's demand to terminate their employment. It did not terminate Held, however, a fact apparently either unknown by Peckstein at that time or unconfirmed.

On July 6, Peckstein, Scott Westfahl, and one other striking employee[5] visited Held at her home to solicit her support for the strike, discuss the Respondent's contract offer, and determine whether Held had been discharged by the Respondent in response to the Union's June 1989 demand, as had Peckstein. Except for Held's small child, there was no one else at home. It is undisputed that Peckstein did most of the talking during the entire visit. Held informed the group that she had not received a discharge notice. After some 20 to 30 minutes of discussion, Held reiterated her refusal to join the strike. Peckstein responded to Held, ''Well, if you valued your life.'' Peckstein and the other two employees left without further conversation. Held testified that the incident ''scared'' her and that she did not exactly understand what Peckstein meant by the statement. She reported the threat to a supervisor, to the Respondent's plant manager, and to the police. She then left town for the weekend.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's finding in connection with the discharge of employee James Jaeger that off-duty deputy sheriffs employed and subject to direction by the Respondent cannot be considered impartial witnesses whose testimony should be accorded special weight as law-enforcement personnel. The judge found that Deputy Sheriff Paul Renkas did not actually see the alleged collision on July 2, 1990, between Steve Maahs' car and Jaeger's leg and foot, about which he testified. Thus, as to that incident, Renkas' impartiality is not at issue. Deputy Sheriff James Materna was the only witness who testified that Jaeger engaged in threatening physical movements against the Respondent's labor consultant, James Schalow, on July 16, 1990. The judge noted that the Respondent did not present witnesses to corroborate Materna's account of the events, even though there were seven individuals present on July 16. Thus, the judge credited Jaeger's testimony that he did not physically threaten Schalow. Under these circumstances, we affirm the judge's credibility resolution and his conclusion that Jaeger was discriminatorily discharged and did not engage in conduct by which he forfeited his eligibility for reinstatement.

In addition, the Respondent has excepted to certain inferences drawn by the judge. It is the judge's duty as the trier of fact to decide whom to believe, to reconcile conflicting evidence, and to draw reasonable inferences from the evidence in a case. Such inferences are entitled to deference if they are supported by substantial evidence on the record as a whole. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). We find no basis in the record for rejecting the inferences drawn by the judge.

[2] We do not rely on the investigatory affidavit of employee Doreen Held. The affidavit was offered, but was not admitted into evidence.

[3] All dates are in 1990 unless otherwise indicated.

[4] The other two employees are Michael Hlavenka and Douglas Owens. The complaint does not allege that the Respondent violated the Act in regard to Hlavenka and Owens.

[5] The third employee is Barbara Depies. The complaint does not allege that the Respondent violated the Act in regard to Depies.

By letter of July 13, the Respondent discharged Peckstein[6] for ''serious strike misconduct'' without further explanation, even though it had not rescinded its July 3 discharge notice.

The judge found, and we agree, that the Respondent's professed capitulation on July 3 to the Union's discharge demand was a sham. The judge relied on the Respondent's yearlong resistance to the Union's discharge demand prior to the strike, its subsequent decision to discharge targeted employees who went out on strike at the same time it permitted nonstriking employees to continue working, its failure to explain its selectivity, and its failure to establish that it would have discharged the strikers in the absence of their support for the strike. The judge concluded that the Respondent unlawfully discharged Peckstein because of her union and protected, concerted activity of joining the strike.

We agree with the judge that as of her discharge on July 3, Peckstein was a discriminatorily discharged employee eligible for reinstatement with backpay. The judge correctly held that the *Clear Pine Mouldings*[7] standard for reinstatement of employees accused of strike misconduct does not apply to the alleged misconduct of strikers after they have been discriminatorily discharged. We also agree with the judge that Peckstein's visit to Held's home for the purposes stated was protected, concerted activity. Further, we agree with the judge that Peckstein's closing remark—''Well, if you valued your life''—reasonably may be interpreted as a threat of physical harm if Held continued to cross the picket line. Finally, we agree with the judge that the Respondent's purported discharge of Peckstein on July 13 was not a discharge or termination but, rather, a refusal to reinstate. Thus, the issue correctly posed by the judge was whether Peckstein should be denied the usual remedies of reinstatement with backpay by virtue of her conduct during the July 6 visit with Held. The judge concluded that Peckstein's conduct was not so outrageous as to render her unfit for employment. Here we part company with the judge.

In determining whether backpay and reinstatement are appropriate remedies where discriminatees engaged in subsequent misconduct, the Board ''looks to the nature of the misconduct and denies reinstatement in those flagrant cases 'in which the misconduct is violent or of such character as to render the employees unfit for further services.''' *C-Town*, 281 NLRB 458 (1986), quoting *J. W. Microelectronics Corp*., 259 NLRB 327 (1981). The Board takes into account whether the misconduct was an ''emotional reaction'' to the employer's own unlawful discrimination against the employee. *Blue Jeans Corp*., 170 NLRB 1425 (1968), citing *NLRB v. M & B Headwear Co*., 349 F.2d 170, 174 (4th Cir. 1965).

Here Peckstein and two other strikers confronted Held at her home when no one except Held's small child was nearby. For some 20 to 30 minutes Peckstein attempted to talk Held into changing her mind and joining the strike. Held protested that she could not afford to strike because she had to support her child. When Held remained firm in her decision to refrain from participating in the strike, Peckstein responded, ''Well, if you valued your life.'' As the judge found, Peckstein's statment, ''Well, if you valued your life,'' may reasonably be interpreted as a threat of physical harm if Held continued to cross the picket line. Finally, it cannot reasonably be said that Peckstein's threat against Held's life, delivered 3 days after Peckstein's discharge, was the kind of emotional reaction, contemplated by the Board in *Blue Jeans Corp*., supra, and *Precision Window Mfg*., 303 NLRB 946 (1991), that would not warrant forfeiture of her reinstatement rights.[8]

We find that by her substantial threat against Held on July 6, particularly under the circumstances of its delivery, Peckstein rendered herself unfit for further service. Thus, she has forfeited her right to reinstatement and backpay after that date. *Fiber Glass Systems*, 278 NLRB 1255 (1986). We modify the recommended remedy accordingly and adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Alto-Shaam, Inc., Menomonee Falls, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraphs 2(a) and (b).

''(a) Offer Scott Westfahl and James Jaeger immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other

[6] The Respondent similarly discharged Westfahl, as explicated by the judge. We affirm the judge's decision as to Westfahl for the reasons set forth by the judge.

[7] 268 NLRB 1044 (1984).

[8] Surely, Held was not responsible for Peckstein's discharge, and Held did nothing to provoke Peckstein. Unlike the present case, in both *Blue Jeans Corp*., and *Precision Window Mfg*., the alleged ''threats to Kill'' by which it was asserted that employees forfeited their reinstatement rights were, respectively, an ''emotional . . . temporary aberration'' and a ''rambling, semicoherent mix of insult and threat'' directed at supervisors while on the employers' premises and were uttered in spontaneous reaction to the employees' discriminatory discharges. Thus, in those cases, the Board concluded that employees did not forfeit their rights to reinstatement. Member Raudabaugh dissented in *Precision* and would have found the ''threat to kill'' disqualifying in that case.

rights and privileges previously enjoyed, and make them whole for losses they suffered by reason of the discrimination against them, as set forth in the remedy section of the decision.

''(b) Remove from its files any reference to the terminations of Scott Westfahl and James Jaeger, and notify each of them in writing that this has been done and that evidence of their unlawful termination will not be used as a basis for future personnel actions against them.''

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

''(c) Make Kristeen Peckstein whole, with interest, for any loss of earnings and other benefits suffered as a result of her unlawful discharge on July 3, 1990, until her July 6, 1990 threat directed against Doreen Held.''

3. Substitute the attached notice for that of the administrative law judge.

MEMBER DEVANEY, dissenting in part.

Contrary to the majority, I would adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employee Peckstein.[1] Although I do not condone Peckstein's remark to Held, I agree with the judge that it was not of such a serious or flagrant nature as to warrant withholding the Board's traditional reinstatement remedy.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in United Steelworkers of America, AFL–CIO–CLC, or any other labor organization, by discharging, terminating, denying reinstatement rights, or otherwise discriminating against employees because of lawful strike, picketing, or other union conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Scott Westfahl and James Jaeger immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or other rights and privileges previously enjoyed, and make them whole, with interest, for losses they suffered by reason of the discrimination against them.

WE WILL remove from our files any reference to the terminations of Scott Westfahl and James Jaeger, and notify them in writing that this has been done and that evidence of their unlawful termination will not be used as a basis for future personnel actions against them.

WE WILL make Kristeen Peckstein whole for any loss of earnings and other benefits resulting from her unlawful termination on July 3, 1990, and occurring until her July 6, 1990 misconduct.

ALTO-SHAAM, INC.

Melvin L. Ford, Esq., for the General Counsel.
Roland Steinle, Esq. and *James C. Schalow*, of Menomonee Falls, Wisconsin, for the Respondent.
John Cleveland, of Brookfield, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Milwaukee, Wisconsin, on March 7 and 8, 1991. The charge was filed on July 24, 1990, by United Steelworkers of America, AFL–CIO–CLC (Union).[1] The complaint, which issued on September 5, alleges that Alto-Shaam, Inc. (the Company or Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly twice terminated employee Kristeen Peckstein, and terminated employees James Jaeger and Scott Westfahl because of their union and other protected concerted activities. The Company's answer denies the commission of the alleged unfair labor practices, and affirmatively alleges in sum that: (1) the Company initially terminated Peckstein on demand by the Union, for failure to pay dues; (2) the three employees engaged in unprotected strike misconduct; and (3) the allegations of the complaint should be referred to arbitration under the *Collyer* doctrine. On motion of General Counsel, other assertions made by way of affirmative defense were stricken by order of Associate Chief Administrative Law Judge John M. Dyer dated February 22, 1991.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. On the entire record in this case[2] and having considered the briefs submitted by General Counsel and the Company, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a corporation, maintains an office and plant in Menomonee Falls, Wisconsin, where it is engaged in the manufacture and distribution of food service equipment and related products. In the operation of its business, the Company annually purchases and receives at its Menomonee Falls facility goods valued in excess of $50,000 directly from points outside of Wisconsin. I find, as the Company admits,

[1] I agree with my colleagues' decision in all other respects.

[1] All dates are for 1990 unless otherwise indicated.
[2] The official transcript of proceedings is corrected.

that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background, the Strike, and the Terminations of Peckstein and Westfahl*

1. The facts

At all times material, the Union was the collective-bargaining representative of the Company's factory employees. In 1987, at a time when there was a collective-bargaining contract in effect, several of the unit employees, including Kristeen Peckstein, resigned from union membership. The Company and the Union subsequently executed a contract containing a maintenance-of-membership clause (sec. 3.2), which provided as follows:

> It shall be a condition of employment that all employees covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement, or who thereafter become members of the Union, shall remain members in good standing in the Union as prescribed by the Constitution.

In June 1989, the Union requested that the Company discharge four employees ''for their failure to maintain their membership status at least to the extent of paying monthly dues.'' The employees were Peckstein, Doreen Held (then Doreen Held Yetka), Douglas Owens, and Michael Hlavenka. The Company refused, and the Union filed a grievance over that refusal. The Company asserted that its refusal was proper because: (1) the neutrality clause of the contract precluded the Company from granting the Union's request; (2) the Union failed to prove that the employees were union members in good standing as of the effective date of the contract (July 8, 1987) or thereafter became members; and (3) the dues-checkoff provisions of the contract were not determinative of the matter. The Union grieved the matter to arbitration. The matter was heard before an arbitrator on May 21, 1990, and the arbitrator set a briefing schedule. Before the parties submitted briefs, the contract expired by its terms (June 30). On Monday, July 2, the Union commenced an economic strike and picketing at the Company's facility. Peckstein, Owens, and Hlavenka joined the strike, but Held crossed the picket line and remained at work. At this point the Company notified the Union of its intention to terminate the employees involved in the grievance. The Union objected, and requested that the Company wait until the arbitrator ruled, and that the employees not be terminated. Nevertheless, by letters dated July 3, the Company notified Peckstein, Owens, and Hlavenka that it was acceding to the Union's demands and terminating each of them. The Company did not terminate Held. The strike ended on July 13, when the Union on behalf of all striking employees made an unconditional offer to return to work. Strikers began returning to work on Monday, July 16. Although ostensibly terminated, Owens and Hlavenka returned to work. The Company never rescinded Peckstein's termination. However by letter dated July 13, the Company notified Peckstein that she was ''terminated effective July 13, 1990 for serious strike misconduct.'' By letter dated July 23, the Union informed the arbitrator and the Company that it was withdrawing its grievance. In its answer to the present complaint, the Company asserted by way of affirmative defense that the Union's original request for Peckstein's termination was an unfair labor practice because ''the real intent was to coerce and intimidate Kristeen Peckstein to pay dues, and to use such situation to attempt to intimidate and coerce other employees by setting a precedent in this matter.'' In this proceeding, the Company offered no explanation as to why the three strikers, but not Held, were terminated on July 3, or why Owens and Hlavenka were able to return to work when the strike ended, without being rehired.

On July 13, the Company also terminated striking employee Scott Westfahl. Company President Jerry Maahs testified in sum that the Company terminated Peckstein and Westfahl on the basis of a report he received that Peckstein, accompanied by Westfahl and a third striking employee (Barbara Depies) threatened Doreen Held at her home. Depies quit her employment on July 9, before the strike ended. Maahs testified that he was unaware of any other threats by Peckstein or Westfahl. He did not personally speak to Held about the matter.

With regard to the alleged threat, Doreen Held testified in sum as follows: She did not join the strike, and worked on July 2. However she did not work for the balance of that week, because she had no babysitter on July 3, the plant was closed on July 4, and she was on vacation for the balance of the week. On Friday, July 6, at about 4:30 to 5 p.m. Peckstein, Depies, and a third employee (whom she did not know but learned to be Westfahl) pulled up into the driveway of her home. Peckstein and Held had been friends. Held went to the window and told them she didn't want any trouble. They said they wanted to talk to her, and she let them in. They remained for some 20 to 30 minutes. Peckstein did most of the talking. She showed Held her termination letter, and asked if Held had received such a letter. Held said she had not, and they told her to check her mailbox. She did, but there was no letter. They asked Held to join the strike. Held said she could not afford to do so. The conversation continued along this line. Finally Peckstein said, ''Well, if you valued your life.'' At this point Peckstein said ''Let's go,'' and the three striking employees left. The conversation broke up between 6 and 6:30 p.m. However, in her affidavit to the Board, Held said the employees left about 7:30 p.m. Held further testified that she called Debra Zimmerman, a friend and company supervisor, who told her to call Plant Superintendent Gregory Lamondo. She was not able to reach Lamondo until 8:30 to 9 p.m. He advised her to call the police, which she did. The police arrived at about 9 p.m. and took her report, but she did not make a formal complaint. Held told Zimmerman, Lamondo, and the police that Peckstein, but not Depies or Westfahl, threatened her. Later that evening Held went to a friend's home, where she remained for the weekend. Lamondo testified that Held called him about 9 p.m., told him that Peckstein, Depies, and Westfahl threatened her, and he advised her to notify the police. The Company did not question or otherwise contact the striking employees or the Union about the matter.

Peckstein, Depies, and Westfahl testified in sum as follows: On July 6 they were at the picket line. They decided to go to Held's home to talk to her about honoring the picket line, the Company's offer in negotiations, and whether Held received a termination letter. They first had dinner, and then proceeded to a tavern near Held's home, where they thought they might find her. She was not there. They each had a drink with dinner and at the tavern, but remained sober. They proceeded to Held's home, arriving about 7:30 (Peckstein testified they arrived about 7:30-7:45 p.m., Depies testified that they arrived about 7 p.m., and Westfahl testified they arrived between 7 and 7:30 p.m.). They saw her car in the driveway. Held came to the window and yelled that she didn't want an argument or a fight. They said they were not there for that, and just wanted to talk about joining the strike. She let them in, and they gathered in the living room where they remained for some 15 to 45 minutes. (Peckstein testified it was 30 to 45 minutes, Depies testified about 30 minutes, and Westfahl testified about 20 minutes.) Peckstein did most of the talking. Held's young son immediately befriended Westfahl, and thereafter Westfahl functioned primarily as a babysitter, remaining out of the conversation.[3] Peckstein asked if Held received the same termination letter as did Peckstein, Owens, and Hlavenka. Held checked her mailbox and reported that there was no letter. Peckstein and Depies tried to persuade Held to join the strike. They also talked about the Company's offer. Held maintained that she could not afford to join the strike. There was no agreement. The conversation was polite, and there was no yelling. They did not threaten Held, or make the closing remark attributed to Peckstein by Held.

Peckstein applied for unemployment compensation. The Company contested the application on the ground that Peckstein was terminated for misconduct. The Wisconsin Unemployment Compensation Division allowed benefits, holding that: ''The first discharge on 7/3/90 is the one that applies for unemployment compensation purposes, not the second one on 7/13/90. An employee cannot be discharged twice without having been rehired in between the discharges. It has not been established the first discharge was for misconduct.'' The Company did not appeal from this determination.

I credit the testimony of the three striking employees concerning their purpose in visiting Held, and the subject matter of their conversation. Held had already made up her mind not to join the strike, and was not much interested in the details of what Peckstein had to say, including the Company's contract proposal. She admitted in her testimony that her recollection was vague about the details of the conversation. I also find that the striking employees were at Held's home between about 7 and 7:30 p.m. and remained for 20 to 30 minutes. Held's estimate of the timing was plainly erroneous. The strikers could not have arrived between 4:30 and 5 p.m., remained for 20 to 30 minutes, and left between 6 and 6:30 p.m. Moreover, Held stated in her affidavit that they left about 7:30 p.m., which was probably correct. However, I credit Held's testimony that Peckstein ended the conversation by saying, ''Well, if you valued your life.'' Held impressed me as a candid person. Held and Peckstein were or had been friends. I find it unlikely that Held would knowingly make a false accusation against Peckstein. Held was also careful to make clear that Depies and Westfahl did not threaten her. In light of Held's testimony, I find that she told the Company that only Peckstein threatened her, and I do not credit Lamondo's testimony that she said all three employees threatened her.

[3] Held, who was presented as a company witness, was not questioned about Westfahl's role in the conversation. However, in her investigatory affidavit Held corroborated Westfahl's testimony concerning his lack of involvement. Held stated: ''During this time Westfahl said nothing except 'hi' to my son. He simply sat on my couch and played with my son.'' General Counsel objected to the Company's proffer of the affidavit, and I sustained the objection. Therefore, although I credit Westfahl's testimony concerning his lack of involvement, I have not taken Held's affidavit into consideration in making that determination.

2. Analysis and concluding findings

All the alleged unfair labor practices, i.e., the terminations of Peckstein, Westfahl, and Jaeger, occurred at times when there was no collective-bargaining contract in effect between the Company and the Union. Therefore the subject matter did not arise under a contract, and deferral to arbitration is not warranted. *Indiana & Michigan Electric Co.*, 284 NLRB 53, 60 (1987). Moreover, the Company's discharge of Peckstein was a repudiation of the arbitration process then in progress. For this additional reason, deferral would not be warranted.

I find that the Company violated Section 8(a)(3) and (1) by discharging Peckstein on July 3. The discharge was unlawful for several reasons. First, as of July 3 there was no outstanding union request for Peckstein's termination. The parties had agreed to submit the matter to arbitration, and on being notified of the Company's intention, the Union requested that the Company wait until the arbitrator ruled, and that Peckstein and the other employees not be terminated. Therefore the Company had no basis for asserting that it was discharging Peckstein pursuant to a union-security agreement. Indeed, as the Company itself argued in the grievance proceeding, the contract contained a neutrality clause which required it to remain neutral with respect to union membership. Instead the Company, acting on its own initiative, discharged Peckstein, ostensibly for her lack of union membership. Such conduct constitutes discrimination in regard to tenure of employment to encourage or discourage membership in a labor organization. Therefore the Company violated Section 8(a)(3). Second, on the basis of its own assertions, the Company had in the words of the statute, ''reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.'' In the grievance proceeding the Company argued that the Union failed to prove that Peckstein and the other employees were members in good standing as of July 8, 1987, or became members thereafter, and therefore required to pay dues under the maintenance-of-membership clause. In its answer to the complaint, the Company asserted in sum that the Union's original demand was arbitrary, discriminatory, and unlawful. The Company's position with regard to the employees' obligations, whether or not correct, was reasonable. Having taken that position, the Act required the Company to stay its hand until the matter was resolved through arbitration, or, as happened, the Union withdrew its request. Having failed to do so, the Company violated Section 8(a)(3). Third, and most

fundamentally, I find that the Company's professed capitulation to the Union's demand was a sham and pretext. The Company discharged Peckstein, Owens, and Hlavenka because they joined the strike. For over a year the Company stubbornly resisted the Union's request that the employees be terminated for nonpayment of dues. As soon as the three employees demonstrated their support for the Union by joining the strike, the Company suddenly became a champion of compulsory unionism, discharging the three employees in disregard of the Union's request that they not be terminated. However, the Company did not terminate Held, who crossed the picket line, and offered no explanation for its selectivity. When the Union abandoned its strike, the Company permitted Owens and Hlavenka to return to work, but professed to again discharge Peckstein. On the basis of the timing of the Company's actions, and its discriminatory action in terminating strikers but retaining the nonstriker, General Counsel presented a prima facie case that the Company discharged Peckstein because of her protected union and concerted activity in joining the strike. In light of the Company's failure to explain and justify its discriminatory pattern of conduct, the Company failed to meet its burden of establishing that it would have terminated Peckstein in the absence of her support for the strike. Therefore the Company violated Section 8(a)(3) and (1) of the Act.

This brings me to the matter of the second ''termination'' of Peckstein. I find that Peckstein's closing remark, ''Well, if you valued your life,'' although vague and tentative, could reasonably be interpreted by Held as a threat of physical harm if she continued to cross the picket line. Therefore Peckstein's threat ''had a reasonable tendency to coerce and intimidate [Held] in the exercise of her rights under the Act.'' *Clear Pine Mouldings*, 268 NLRB 1044, 1048 (1984), affd. 765 F.2d 148 (9th Cir. 1985). Peckstein's threat was comparable to a threat found by the Board to be coercive in *Clear Pine Mouldings* (striker Sittser telling a nonstriking employee that she was taking her life in her hands by crossing the picket line and would live to regret it).

In cases involving alleged strike misconduct by current employees (here, Westfahl and Jaeger), the allocation of burden of proof and burden of going forward with the evidence may be summarized as follows: General Counsel must first establish a prima facie case consisting of (1) the employees, to the employer's knowledge, were engaged in a lawful strike; (2) an unconditional offer to return to work was made for or on behalf of employees; and (3) the employer failed or refused to reinstate the employees. The burden then shifts to the employer to establish that it held an honest belief that the striking employees who were denied reinstatement engaged in misconduct of such a serious character as to justify the employer in denying them their jobs. Once having established such an honest belief that the employees engaged in the strike misconduct, and were refused reinstatement therefor, the employer (absent other considerations not here alleged, e.g., disparate treatment, condonation, or unfair labor practice strike), is normally absolved from liability unless General Counsel affirmatively proves that the employees did not in fact engage in such misconduct. See *General Telephone Co. of Michigan*, 251 NLRB 737 (1980), enfd. 673 F.2d 551 (D.C. Cir. 1981); *National Steel Corp*., 242 NLRB 294, 298 (1979). See also *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). In *General Telephone Co. of Michigan*, supra, the Board held with respect to the employer's burden:

> The burden of establishing an ''honest belief'' of misconduct requires more than the employer's mere assertion that an ''honest belief'' of such misconduct was the motivating force behind the meting out of discipline. Meeting the burden also requires more than a general statement about the guidelines used in establishing the alleged ''honest belief.'' Rather, it requires some specificity in the record, linking particular employees to particular allegations of misconduct.

The above rules have since been modified in an important substantive respect, with respect to the definition of ''misconduct of such a serious character'' as to justify denial of reinstatement. In *W. C. McQuaide, Inc*., 220 NLRB 593, 594 (1975), enf. denied in pertinent part 552 F.2d 519, 527–528 (3d Cir. 1977), the Board held in sum that verbal threats by strikers, ''not accompanied by any physical acts or gestures that would provide added emphasis or meaning to [the] words,'' do not constitute serious strike misconduct warranting an employer's refusal to reinstate the strikers. However, in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), affd. 765 F.2d 148 (9th Cir. 1985), the Board rejected this standard, holding instead that the test for determining whether verbal threats by strikers directed at fellow employees justify an employer's refusal to reinstate is ''whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.''

If the above standards were applicable to Peckstein, I would find that the Company did not violate the Act by terminating her on July 13. On the basis of reports received by company supervisors, the Company could honestly believe that Peckstein engaged in unprotected strike activity which would justify denial of reinstatement. General Counsel failed to prove that Peckstein did not engage in such misconduct. However, those standards are not applicable to Peckstein. As of July 3, Peckstein's status was that of a discriminatorily discharged employee who was entitled to the usual Board remedies of reinstatement with backpay. The Company's action on July 14 was not a discharge or termination. The Company had already terminated Peckstein. Rather by its July 13 letter the Company in substance refused to reinstate Peckstein. The Michigan Unemployment Compensation Division recognized as much. As the Division correctly held: ''An employee cannot be discharged twice without having been rehired in between the discharges.'' The Company never rehired Peckstein. Therefore the issue presented is whether Peckstein, by reason of her misconduct on July 6, should be denied the usual remedies of reinstatement with backpay for her discriminatory discharge on July 3. The Board has in some cases exercised its discretion to deny reinstatement to a discriminatee who engaged in outrageous conduct which rendered the employee unfit for employment, where (as here) such misconduct occurred after the discriminatory termination or was unknown to the employer at the time of the termination. See *East Island Swiss Products*, 220 NLRB 175 (1975), involving conviction for misappropriating funds, and *O. R. Cooper & Son*, 220 NLRB 287 fn. 1 (1975), involving intentional destruction of employer's prop-

erty. The standard for determining whether a discriminatee has engaged in conduct which renders the employee unfit for employment, is much stricter than that for determining whether an employer may refuse to reinstate a current employee by reason of strike misconduct. Coercive strike misconduct does not per se preclude reinstatement of the discriminatee. In *Dalton Telephone Co*., 82 NLRB 1001, 1006 (1949), enfd. 187 F.2d 811 (5th Cir. 1951), the Board held that an unfair labor practice striker (who together with the other strikers had been unlawfully denied reinstatement, was not rendered unfit for reinstatement by reason of the fact that she pleaded guilty to a charge of assault and battery on a nonstriker). In *Hotel Roanoke*, 293 NLRB 182 (1989), the Board held that an unfair labor practice striker was entitled to reinstatement, notwithstanding that she told a nonstriker ''I'll beat your ass.'' In *Shell Oil Co. v. NLRB*, 196 F.2d 637 (5th Cir. 1952), the court held that proven theft did not preclude reinstatement of a discriminatorily discharged employee.

I find that Peckstein did not engage in strike-related misconduct of such an outrageous character as to render her unfit for employment. Her threat to Held was vague, generalized, and unaccompanied by any gesture or act of violence. This was a single, isolated statement. The strike ended a week later, and is long since over. Prior to *Clear Pine Mouldings*, the threat would not have even precluded reinstatement of a currently employed striker who had not been the victim of a discriminatory discharge. Therefore I find that the Company violated Section 8(a)(3) and (1) by refusing to reinstate Peckstein, and that by reason of her unlawful discharge on July 3, she is entitled to the usual remedies of reinstatement with backpay.

With respect to Westfahl, I find that the Company failed to demonstrate it had an honest belief that Westfahl engaged in serious strike misconduct which would justify denial of reinstatement. The Company knew at most that Westfahl was present when Peckstein made the alleged threat. This alone would not give rise to a good-faith belief that Westfahl participated in or was responsible for such misconduct. See *General Telephone Co. of Michigan*, supra. Assuming that the Company did have a good-faith belief, I would find that General Counsel carried its burden of proving that Westfahl did not participate in and was not responsible for the misconduct. Peckstein, Depies, and Westfahl agreed that they would visit Held for the purpose of talking to her about joining the strike, the Company's contract proposal, and whether Held received a discharge letter. Such conversation constitutes protected activity under Section 7 of the Act. They did not agree to threaten her or engage in any other improper conduct. Held invited the three employees into her home. At the end of the conversation Peckstein took it on herself to make an improper threat. By this time Westfahl had excluded himself from the conversation, was barely listening to what was said, and was substantially engaged in babysitting. He was not responsible for or a party to Peckstein's improper remark. Therefore I find that the Company violated Section 8(a)(3) and (1) by terminating Westfahl.[4]

[4] *North Cambria Fuel Co*., 247 NLRB 1408 (1980), enfd. 645 F.2d 177 (3d Cir. 1981), relied on by the Company (Br. 29), is not in point. In that case the Board found the employer had reason to believe that all the participating pickets (except one who left before the misconduct began), were involved in rock throwing, and General Counsel failed to prove that any of them did not engage in such misconduct. *Buffalo Concrete*, 276 NLRB 839, 842 (1985), revd. in pertinent part 803 F.2d 1333, 1340 (4th Cir. 1986), cited by General Counsel (Br. 18), is also distinguishable on its facts. In that case a striker, Johnson, was present when another striker assaulted a nonstriker. While this conduct was occurring, Johnson told another striker, ''Don't get on the radio.'' The court, in disagreement with the Board, found that Johnson thereby associated himself with the assault, and therefore the employer lawfully refused to reinstate Johnson. Unlike the present case, *North Cambria* and *Buffalo Concrete* did not involve strikers who were present but demonstrably did not participate in or associate with the improper conduct.

B. *Termination of Jaeger*

1. Jaeger's discharge and the events of July 2

Employee James Jaeger joined the strike and participated in the picketing. By letter dated July 13, the Company notified Jaeger that he was terminated as of that date ''for serious strike misconduct.'' Company President Maahs initially testified that Jaeger was terminated ''because of an incident involving him claiming that my son,'' (meaning Company National Sales Manager Steve Maahs) ''hit him going through the picket line.'' President Maahs testified that he considered the allegation to be false, and there was no other specific reason for the termination. President Maahs volunteered that there was a pattern of vandalism, with tacks thrown under tires and tires slashed. However, Maahs asserted that Jaeger was not terminated because of other employees' alleged misconduct. After further questioning on the reason for Jaeger's termination, President Maahs added, almost as an afterthought, that part of the incident involved Jaeger pounding and jumping on Steve Maahs' car.

The incident in question occurred on July 2, the first day of the strike. The Company procured the services of Waukesha County deputy sheriffs in connection with the strike. These deputy sheriffs served on a volunteer basis, after or before their regular work shift. The Company paid them directly at rates negotiated by the Company and the Waukesha County sheriff. They were responsible for keeping the peace on the picket line, maintaining crowd control, protecting persons and property, and initially, to direct traffic in the plant area. After July 2, the Menomonee Falls police assumed responsibility for directing traffic. However, on July 2, there were no municipal police at the strike scene. Deputy Sheriff Paul Renkas testified that he tried to reduce the level of profanity because of the presence of children in the area. He told the Union that he would arrest all the pickets if they engaged in profanity or suggestive physical gestures. The evidence indicates that at least to some extent the deputy sheriffs acted in accordance with the Company's instructions or requests. As will be further discussed, on July 16 (after the strike ended) the Company summoned two deputy sheriffs to be present when Jaeger was informed of his discharge. The complaint does not allege, nor is it necessary to determine whether the deputy sheriffs acted as company agents. However, as the Company presented two deputy sheriffs as witnesses in connection with the Jaeger termination, I find it necessary to consider the weight to be accorded their testimony by reason of their status as deputy sheriffs. As trained law enforcement officers, I find that their testimony as to objective factors such as distances and dimensions is entitled to

particular significance. However, as they were paid directly by the Company, and acted to some extent at the Company's direction, I find that they cannot be regarded as wholly impartial witnesses, in the same sense that I would regard the local police. Therefore on the critical questions of what Jaeger and Steve Maahs did or did not do, I find that their testimony is not entitled to any special weight.

The Company's facility is located on Water Street, which is east of the plant, running in a north-south direction.[5] There is a parking lot, normally used by factory employees, located southeast of the facility. South of the facility and factory employees' parking area is a driveway leading to Water Street. The driveway is about 12 to 15 feet wide, reaching a width of about 16 feet at Water Street, i.e., the driveway is wide enough to accommodate two lanes of cars. At the southeast corner of the driveway, where it intersects with Water Street, there is a decorative island, some 3-1/2 to 4-1/2 feet wide and 12 feet long, consisting of a mound covered with rocks and shrubbery. South of the driveway is a parking area normally used by office personnel. Cars here are parked perpendicular to the driveway. There is no barrier between the driveway and the office parking area and the driveway. Cars normally back out and proceed east on the driveway to Water Street. There is another access to Water Street located south of the office parking area. This access was closed during the strike, although some personnel occasionally made use of the access. Factory employees normally worked from 7 a.m. to 3 p.m., although some worked overtime. Office personnel normally worked from 8:30 a.m. until (at least on July 2) shortly before 5 p.m.

On July 2, between 4:30 and 5 p.m., about 20 pickets were gathered at the entrance to the driveway, yelling, shouting, carrying picket signs, and marching across the driveway. There were also spectators and two deputy sheriffs (Renkas and Ehlers) on duty. A total of about 30 persons were present in the area of the driveway entrance. At about 4:50 p.m. cars lined up in the driveway preparatory to leaving the facility. The deputy sheriff followed a practice of letting the pickets make one circle of the driveway entrance in front of each exiting vehicle, and then permitted the driver to exit onto Water Street. General Counsel presented three witnesses concerning the incident (Jaeger, Union Representative Robert Glaser, and striker Bradley Paul). The Company presented four witnesses concerning the incident (Steve Maahs, Deputy Sheriff Renkas, and office personnel Karen Lindberg and Rene' Conrad.[6] As will be discussed, only Jaeger was in a position to see exactly what happened, although Steve Maahs and possibly Conrad were in a position to see part of the incident.[7]

Steve Maahs testified in sum as follows: At about 5 p.m. he pulled out of the office personnel parking area and proceeded down the driveway toward Water Street, about 50 yards away. He was in a line of cars proceeding on the right (south) side of the driveway. Karen Lindberg was driving in front of him and Rene' Conrad in back of him. Cars were parked on both sides of the driveway. Lindberg proceeded up to Water Street and there stopped for about 3 minutes. Maahs stopped behind her. The deputy sheriffs permitted the pickets to circle the driveway entrance. They then directed the pickets to stop. All but one congregated on the left (north) side of the driveway. Jaeger went to the right side near the decorative island. Lindberg proceeded out and south on Water Street, and Maahs moved up to take her place at the head of the line. He remained stopped for 6 to 8 seconds, and then proceeded ahead, intending to turn right on Water Street. At this point Jaeger, who had a picket sign in his right hand, clenched his left fist, and struck the hood of Maahs' car with that fist. The hood buckled. Maahs later found a slight dent in his car. Jaeger did not make any sudden movement. He was 3 to 6 inches from Maahs' car. Maahs later found a slight dent in his car. Maahs was close to Jaeger because of the large group of pickets on his left. Maahs proceeded away from the plant and said nothing to anyone about the matter until July 5, when he returned to work. At that time he learned that Jaeger complained to the police that Maahs struck him with Maahs' car. On July 10 Maahs, accompanied by company counsel, gave a written statement to the Menomonee Falls police department. In that statement Maahs said that he did not remember with which hand Jaeger struck his hood. He also said that he did not know if any part of his car struck Jaeger, and did not know that anything happened until he returned to work on July 5. In his investigative affidavit to the Board's Regional Office, dated August 21, Maahs stated that Jaeger had a picket sign in his right hand, made a fist with his left hand, and appeared to jump up and slam his left hand into the car's hood. Maahs added that this was the only contact between Jaeger and Maahs' vehicle.

Deputy Sheriff Renkas testified in sum as follows: At about 4:50 p.m. cars leaving the facility were as directed, lined up on the right side of the driveway. All cars came from the factory parking area. There were no cars parked in the office parking area. Maahs' was the second or third car in line. The deputy sheriffs permitted the first car to exit, and then the second, as the pickets at this point refrained from marching across the driveway. Maahs' car was the next car in line. Jaeger was the only person on the south side of the driveway. Renkas did not recall that Jaeger had a picket sign. Maahs proceeded ahead at less than 5 miles per hour. At this point Jaeger, who had been about 3 feet from Maahs' car, made a ''surge'' or ''sudden movement'' toward Maahs' car. Renkas, who was watching both sides of the picket line, heard ''some type of contact, or thump.'' Jaeger was not behind Renkas when he heard the thump. Jaeger screamed violently. His body rotated toward the decorative island, and Jaeger jumped up and down on the paved area. Maahs proceeded south on Water Street. Renkas stopped traffic, summoned Jaeger, and turned over traffic direction to Deputy Sheriff Ehlers. Jaeger yelled that he was hit by Maahs' car. Renkas asked what happened. Jaeger first said that he was hit by the rear bumper, but later said the tire ran over his foot. He said the injury was to the top of his right foot. Renkas asked if he wanted medical attention. Jaeger was uncertain, although Renkas offered to accompany him to the

[5] Company counsel prepared a rough diagram of the facility area, which he used in questioning witnesses. However, he mismarked north and south, causing some confusion during cross-examination of General Counsel's witnesses. The diagram was corrected during the testimony of Deputy Sheriff Renkas, the Company's first witness concerning the Jaeger incident.

[6] Company counsel represented that Deputy Sheriff Ehlers was unable to testify because of his illness. I have not drawn any inference by reason of his failure to testify.

[7] In connection with the incident, ''Maahs'' refers to Steve Maahs.

hospital. Renkas said that if Jaeger was not injured, he could be charged with obstruction of a police officer. Jaeger declined medical attention. Renkas asked to examine Jaeger's foot, and had him remove first his shoe and then his sock. Renkas observed no signs of injury, no marks on the shoe or sock, and only ''a sweaty foot with impressions of cotton from the socks on.'' Renkas was requested to and gave a written statement to the Menomonee Falls police in connection with Jaeger's complaint. Renkas stated: ''at approximately 16:55 hrs. I was observing the striking picketers on the north side of the drive. Behind me I heard a car accelerating and a thump. When I turned around I observed the car leaving south on Water Street and [Jaeger] yelling and jumping up and down.'' Renkas said nothing about Jaeger making a lunge or sudden movement. Renkas' notes of his interview with Jaeger indicated ''pain on top of right foot,'' ''run over,'' and ''may have struck on bumper.'' There was no reference to ''tire'' or ''rear'' bumper. I find that Renkas' statement to the police is a more reliable indicator of what he saw and heard than his own prepared testimony in this proceeding. In light of the admissions in his statement, I find that Renkas did not see the incident between Maahs and Jaeger.

Company Marketing Coordinator Karen Lindberg testified in sum as follows: She was first in line waiting to exit the driveway. Maahs was directly in line behind her, the line being on the right side of the driveway. The deputy sheriffs stopped her, and she remained for about 2 minutes while the pickets circled the driveway entrance. When the officers motioned her to to proceed, she moved slowly forward and turned left onto Water Street. She did not know the factory employees, and did not see the incident between Maahs and Jaeger. Rene' Conrad, then a company office employee, testified in sum as follows: Maahs had been parked in the factory employees' lot. She was the third in a line of cars exiting the driveway. The officers permitted the car in front of her to go. At that time there were about two strikers on the right side of the car. As the car proceeded slowly ahead and turned right, one of the strikers ''apparently just leaned himself into the car,'' and then grabbed his leg or knee, saying ''I'm hurt.'' Conrad subsequently testified that the striker ''lunged'' into the car. Conrad expressed the opinion that the striker was faking an accident, and testified that she did not see any contact between the striker and the car. She testified that the striker did not hit the car with his fist, and that she never said the striker threw himself on the car. However, in her affidavit to the Board's Regional Office, Conrad stated that ''the guy who said he got hit threw himself on Steve's car.''

James Jaeger testified in sum as follows: On July 2 he arrived on the picket line at about 9 a.m. and remained all day. Cars began leaving at about 5 p.m. They were lined up on the left (north) side of the driveway. There were some 20 to 30 pickets in the driveway area. At the time of the incident, Jaeger was on the south side of the driveway near the decorative island. He was holding a picket sign (poster board on a stick). There were pickets on both sides of the line of cars. However, Jaeger could not say how close the nearest picket was to him. The pickets made a loop and then moved out of the way of the line of cars. A car, which he subsequently recognized as Maahs', pulled out of the office parking area, and proceeded down the south side of the driveway, past the line of cars, accelerated to a speed of about 25 miles per hour, and ''caught me in the, my right leg and foot as he went by.'' The lowest part of the car, near the headlight, possibly the bumper, struck Jaeger's foot and lower leg. The impact knocked Jaeger slightly off balance, but he continued to hold his picket sign. Maahs spun his wheels and sped down Water Street without stopping. Jaeger did not strike Maahs' car, although he may have touched the car when he jumped out of the way. As Maahs proceeded down the driveway, Jaeger initially assumed that Maahs would slow down or stop. Jaeger tried to move out of Maahs' way when the car was about 15 feet away. Jaeger sustained a contusion to the top (instep) of his right foot. He subsequently felt his foot throbbing when he arrived home. The bruised area was purple for about a week. There was initially slight swelling, but no break in the skin. His foot was red, but this may have been from wearing his shoe all day. That evening Jaeger went to a clinic. However, he did not describe what if any treatment he received. Jaeger told the deputy sheriff that Maahs hit him with his car. Jaeger did not otherwise describe their conversation. Jaeger also made a report to the Menomonee Falls police.

Union Representative Glaser testified in sum as follows: On July 2 he was at the picket line when the incident occurred. He saw a car approaching the driveway. He heard a sound, like something hit. He turned and saw Jaeger ''being propelled backward.'' He did not know whether Jaeger jumped. Striker Bradley Paul's testimony was confused and contradictory. Paul initially testified that at the time of the incident he was close to Jaeger, and that he saw Maahs ''backing out of his parking spot heading toward us.'' Paul subsequently testified that he was on the driver's side of the car, i.e., on the opposite side from Jaeger. Paul variously testified that there were no cars lined up in the driveway, that there were a few cars in the driveway, and that no cars exited before Maahs. Paul further testified in sum as follows: He did not see Jaeger hit, and he did not see any contact between the car and Jaeger, because the hood of the car blocked his view. However, he heard a thud and saw Jaeger spinning around. Jaeger backed toward the decorative island. Maahs appeared to be driving at about 10 to 15 miles per hour, but not more than 15 miles per hour. In light of the testimony of Glaser and Paul, it is evident that neither saw what actually happened.

Jaeger and Maahs each filed a charge with the Menomonee Falls police department. Jaeger charged that Maahs struck him with his car, and Maahs charged that Jaeger made a false report. The police declined to prosecute either charge. The Company failed to present any corroborative evidence to support Maahs' assertion that Jaeger slightly dented the hood of his car. The Company presented no photographs of the hood, and Maahs never repaired the alleged damage. As indicated, Maahs admitted that until he learned that Jaeger complained to the police he was inclined to ignore the whole matter. General Counsel failed to present any corroborative evidence to support Jaeger's assertion that he sustained a contusion on his foot. No photographs were taken of his foot, and no evidence was presented concerning treatment if any and diagnosis at the clinic. Jaeger authorized release of the clinic's records, and General Counsel had the clinic's report in its possession. However, General Counsel

did not offer the report in evidence, either independently or through testimony.

There are elements of truth in the testimony of the witnesses. However, I find that none of the witnesses presented an accurate description of what happened. Witnesses for each side contradicted themselves and each other all over the lot. However, I find that their collective testimony enables me to determine what probably occurred and what probably did not occur. I find that Jaeger did not dent the hood of Maahs' car, slightly or otherwise. As indicated, Maahs' assertion in this regard was totally uncorroborated. His inclination to ignore the matter, and not even mention it, was inconsistent with that assertion. Jaeger was holding a picket sign in one hand, and never let go of the sign. Therefore it is unlikely that he could have struck the car with sufficient force to dent the hood. I further find that Jaeger did not sustain any injury. As indicated, Jaeger's assertion in this regard was totally uncorroborated. Moreover, Jaeger's description of the contact between himself and the car, was inconsistent with injury to the instep of his foot. If Jaeger were struck by the area of the car near the headlight, then any injury would be to his leg, and not the instep of his foot. Moreover, if Maahs were proceeding at 25 miles per hour, then Jaeger probably would have suffered a fracture or other serious injury, and not merely a minor bruise on his foot. Even if I credited Jaeger's testimony concerning the alleged bruise, it is evident (and even striker Paul conceded), that Maahs must have been proceeding at a relatively low rate of speed.

The evidence indicates that there was considerable congestion and crowding at the driveway exit to Water Street. All the pickets except Jaeger were congregated on the north side of the driveway. Maahs admitted in his testimony that he tried to avoid the large group of pickets on his left, that he intended to turn right, and that he came within a few inches of Jaeger, who was in a narrow area between the car and the decorative island. Jaeger admitted that he may have touched Maahs' car when he jumped out of the way. Their testimony points the way to the actual facts. I find that Maahs was proceeding in a line of cars exiting from the south side of the driveway. It is unlikely that the deputy sheriffs would direct outgoing traffic to proceed on the left side of the driveway. As Maahs proceeded out the driveway, attempting to avoid the congregated pickets on his left, he unintentionally brushed against Jaeger on his right. Jaeger, believing that Maahs tried to run him down, angrily hit the hood of Maahs' car with his fist, but did no damage. This was the noise which the witnesses heard. It is unlikely that the slight impact between Maahs' car and Jaeger's body caused an audible noise. Jaeger, who had been on the picket line all day, easily confused the fatigue pains in his feet with a belief that they were caused by the impact of Maahs' car.

Returning to the testimony of President Maahs, I find in light of that testimony, that the alleged misconduct for which Jaeger was assertedly discharged, consisted of his accusation that Steve Maahs hit him. The Company did not terminate Jaeger because he allegedly pounded or jumped on Steve Maahs' car. If Jaeger did not accuse Steve Maahs of hitting him, the entire incident would have been disregarded. As indicated, Steve Maahs never even intended to mention the incident to anyone. Assuming, arguendo, that Jaeger's action in hitting the car played a role in his discharge, I would find that (1) the Company did not have an honest belief that Jaeger engaged in coercive strike misconduct of such a serious nature as to justify denial of reinstatement, and (2) the evidence demonstrates that Jaeger did not engage in coercive misconduct. As found, Jaeger, acting in the mistaken belief that Steve Maahs tried to run him down, angrily struck one blow at Maahs' car with his bare fist, doing no damage. Maahs attached no significance to the incident. So far as indicated by the present record, no one other than Maahs saw Jaeger hit his car. As indicated, Rene' Conrad testified that she did not see Jaeger hit the car. In these circumstances, Jaeger's spontaneous response cannot be viewed as coercive misconduct which would warrant denial of reinstatement. See and compare *Newport News Shipbuilding Co. v. NLRB*, 738 F.2d 1404, 1409–1410 (4th Cir. 1984) (employer not justified in terminating striker who forced one departing vehicle to slow down, rapped her fist against the windows of two departing vehicles, and bit and kicked a police officer who tried to arrest her); *Pace Oldsmobile*, 256 NLRB 1001, 1011 (1981), enfd. in pertinent part 681 F.2d 99 (2d Cir. 1982) (employer not justified in denying reinstatement to striker who hit window of employer's showroom without damaging window).

As for Jaeger's charge that Maahs hit him, i.e., the professed reason for Jaeger's termination, the pertinent Board policy was recently restated in *Wabeek Country Club*, 301 NLRB 694 (1991). ''Within the area of concerted activities, false and inaccurate statements are protected so long as they are not malicious.'' Jaeger's allegation did not rise to the level of a maliciously false statement. First, the accusation was technically true, because Maahs' car brushed against Jaeger as Maahs exited the driveway. Second, Jaeger had a mistaken although good-faith belief that Maahs intentionally struck him, causing injury to his foot. His accusation was not malicious, i.e., it did not constitute ''the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent.'' *Black's Law Dictionary*, 5th Edition, definition of ''malice.'' Therefore Jaeger's accusations that Maahs struck and injured him, constituted expressions of opinion in connection with the strike, which are protected activity under Section 7 of the Act. By terminating Jaeger for making these accusations, the Company violated Section 8(a)(3) and (1).

2. The events of July 16 and whether Jaeger is entitled to reinstatement with backpay

As Jaeger was discriminatorily and unlawfully terminated, he is entitled to the usual remedies of reinstatement with backpay, unless he subsequently engaged in outrageous misconduct which rendered him unfit for employment. The Company contends that by reason of an incident which occurred on July 16, Jaeger would not be entitled to those remedies even if his discharge was unlawful.

On Monday, July 16, Jaeger returned to work with other strikers. His termination notice arrived in the mail that day. At the time he reported to work he was unaware of his termination. He found his timecard had been pulled. Three witnesses testified concerning the ensuing events: Jaeger, County Deputy Sheriff James Materna, and Dennis Jansen, a company supervisor who is presently in training to succeed Plant Superintendent Lamondo. Most of the material operative facts are undisputed, although one critical fact is in dispute.

Jaeger testified in sum as follows: Lamondo told him he no longer worked there. Jaeger asked why. Lamondo answered ''because I said so.'' Jaeger suggested this was no reason. Lamondo asked if he would talk to Company Labor Relations Consultant James Schalow. Jaeger agreed. He waited for about 15 minutes. Lamondo returned with Schalow and two deputy sheriffs. Jaeger asked why he was fired. Schalow answered that he was fired for serious strike misconduct. (In his affidavit to the Board, Jaeger stated that Schalow said he was fired for ''serious misconduct on the picket line.'') Jaeger asked what he did. Schalow repeated that he was fired, spelling the word. He was yelling. Jaeger asked whether it was because he was hit by a car. Schalow answered no, that Jaeger was a liar, and that he pounded on the car with his fist and picket sign, denting the hood. Jaeger called Schalow a ''fat fucking pig.'' Schalow told Jaeger to leave. Jaeger went for the door, but was grabbed by the deputy sheriffs. They twisted his arm, called him a troublemaker and an asshole, frisked him, including his private parts, and handcuffed him. Jaeger asked why he was arrested. They said because of his vulgar language. Jaeger replied that they called him an asshole. The Menomonee Falls police arrived, and the deputy sheriffs transferred custody of Jaeger to the police. Jaeger was cited for disorderly conduct. Jaeger was convicted and fined $85 for disorderly conduct, specifically, being loud or boisterous in a public or private place. Jaeger was never charged with attempted assault.

Supervisor Jansen testified in sum as follows: On July 16 at about 2:45 p.m. he was present in Lamondo's office. Also present were Jaeger, Lamondo, two other company personnel, and two deputy sheriffs. Schalow arrived a few minutes later. Jaeger came in and asked why he was terminated. Lamondo said he was fired, and would receive a letter. Jaeger again asked why he was fired. Lamondo said he would get Schalow to come and explain the reason. After Schalow arrived there was a discussion which got heated. Jansen put his head down. When he looked up Jaeger was being handcuffed and taken away. Jansen's testimony has no probative value. His testimony concerning the initial conversation between Jaeger and Lamondo was hearsay. That conversation took place at the timeclock. Jansen was not a party to their conversation. Jaeger was in Lamondo's office because Lamondo arranged for him to meet there with Schalow. As for what transpired between Jaeger and Schalow, Jansen saw and heard nothing or chose not to see or hear anything.

Deputy Sheriff Materna testified in sum as follows: On the afternoon of July 16, he was present in a company office with the deputy sheriff Brian Gerr, Jaeger, Schalow, and four or five other persons. The Company requested the deputies' presence because ''there might be some problems with a party.'' When the deputies arrived Jaeger and Schalow were talking. Schalow raised his voice toward the end of the meeting. When the deputies arrived Jaeger was being terminated. Schalow told Jaeger at least three times that he was terminated. He spelled the word ''fired.'' Jaeger insisted he was not fired. Schalow requested him to leave. Jaeger said he would not leave, and called Schalow a fat fucking pig. At this point the deputies told Jaeger he should leave. Jaeger said he would not leave until he was ready. Jaeger was seated about 6 feet from Schalow. He got up, and lunged toward Schalow, with one hand toward Schalow's throat. The deputies grabbed Jaeger when he was about 2 feet from Schalow. Jaeger struggled and used profanity toward the deputies. They frisked his entire body, arrested him, and turned him over to the local police. They charged him with disorderly conduct because he was loud and unruly, specifically, because of the profanity he used toward the deputies. Jaeger was not charged with assault or attempted battery.

The only material fact question presented by the events of July 16, concerns what if anything Jaeger did when he arose from his seat. This boils down to a credibility issue between Jaeger and Deputy Sheriff Materna. Although there were seven persons in the room besides Jaeger (Schalow, four company personnel, and the two officers), the Company presented only two as witnesses to the event. Only Materna professed to see what happened, and only he testified that Jaeger made any kind of threatening physical movement toward Schalow. Lamondo was presented as a company witness, but was not asked about the July 16 events, although he was involved in those events. Schalow, together with Attorney Steinle, presented the Company's case in this proceeding, but did not testify. The Company excused Deputy Sheriff Gerr as a witness, asserting that his testimony would have been repetitious. Considering that Materna's testimony concerning the matter was totally uncorroborated, the excuse is not persuasive. The Company did not call as witnesses the other two company personnel who were present. I find that the Company's failure to question Lamondo about the matter, although he was presented as a company witness, warrants an inference that his testimony would have been unfavorable to the Company. *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977).

I credit Jaeger's testimony concerning his conversation with Lamondo, which led to the meeting with Schalow. That testimony was contradicted only by Jansen's hearsay testimony. I find, as Jaeger admitted, that he called Schalow a fat fucking pig. I further find that he physically resisted the officers and swore profusely at them. However, I find that he got up to leave and did not physically threaten Schalow in any way. It is significant that Jaeger was charged only with disorderly conduct by reason of his abusive language toward the officers. If Jaeger had attempted to strike or throttle Schalow, he probably would have been charged with assault or attempted battery. There was no such charge. It is also evident that the officers regarded Jaeger's language toward Schalow as simply an overheated portion of their conversation, and not as a basis for a charge of disorderly conduct. As Jaeger and Schalow were seated in close proximity, it would have been easy for the officers to mistakenly assume that Jaeger was menacingly heading toward Schalow. Therefore they quickly grabbed Jaeger.

I find that Jaeger did not engage in outrageous misconduct which rendered him unfit for employment. First, Jaeger was provoked into using strong language. He was discriminatorily discharged, and not notified of his discharge before returning to work on July 16. Lamondo and Schalow treated him in an insulting and demeaning manner. They acted as if it were none of his business to know the reason or reasons for his termination. Schalow shouted at him and acted as if Jaeger did not know the meaning of the word fired. It is not surprising that Jaeger responded in language common to the factory workplace. Had Lamondo or Schalow quietly and calmly explained the Company's professed reason for his termination, the meeting would not have taken on the dimensions which

it did. Jaeger also believed that he was unjustly roughed up and abused by the officers, including invasion of his private parts, and responded with what he regarded as appropriate language. His behavior in this regard was a matter between himself and the law authorities, and did not render him unfit for employment. His one outburst at Schalow did not constitute grounds for denial of reinstatement and backpay to a discriminatorily discharged employee. In *Hit 'N Run Food Stores*, 231 NLRB 660, 664 (1977), the Board held that a discriminatee was entitled to full reinstatement, notwithstanding that on her return to work she accused the employer's president of stealing firm funds, and cursed the employer's general manager in language comparable to that used by Jaeger. *Hit 'N Run* presented a more persuasive case for denial of reinstatement than the present case. In *Hit 'N Run*, the employee directed her language at high level supervisors with whom she would be in regular contact. In the present case, Jaeger was talking to an outside consultant with whom he normally would not have contact in his work.[8] Therefore, I find that Jaeger is entitled to the usual remedies of reinstatement with backpay.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily terminating and refusing to reinstate Kristeen Peckstein, Scott Westfahl, and James Jaeger, thereby discouraging membership in the Union, the Company has violated and is violating Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and from like or related conduct, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company discriminatorily terminated and refused to reinstate Kristeen Peckstein, Scott Westfahl, and James Jaeger, it will be recommended that the Company be ordered to offer them immediate and full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits that they may have suffered from the time of their discharge to the date of the Company's offer of reinstatement. I shall further recommend that the Company be ordered to expunge from its records any reference to their unlawful terminations, to give each of them written notice of such expunction, and to inform them that its unlawful conduct will not be used as a basis for further personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982). Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[9] It will also be recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Alto-Shaam, Inc., Menomonee Falls, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in United Steelworkers of America, AFL–CIO–CLC or any other labor organization, by discharging, denying reinstatement rights, or otherwise discriminating against employees because of lawful strike, picketing, or other union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Kristeen Peckstein, Scott Westfahl, and James Jaeger immediate and full reinstatement to their former jobs, or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for losses they suffered by reason of the discrimination against them as set forth in the remedy section of this decision.

(b) Expunge from its files any reference to the terminations of Kristeen Peckstein, Scott Westfahl, and James Jaeger, and notify each of them in writing that this has been done and that evidence of their unlawful termination will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll

[8] *NLRB v. National Furniture Mfg. Co*., 315 F.2d 280, 286 (7th Cir. 1963), relied on by the Company (Br. 56–57), did not present a situation comparable to that of Jaeger in the present case. In *National Furniture* the court, in disagreement with the Board, held that a discriminatee engaged in a course of conduct which indicated ''a basic antagonism'' between the employee and the employer ''that would preclude future harmonious relations between them.'' The employee not only repeatedly insulted the employer's general manager, including remarks at the unfair labor practice hearing, but also disparaged the employer's business to one of its customers. In the present case Jaeger made one provoked outburst which would not preclude him from the faithful performance of his work. Indeed the court observed that this was not simply ''a conflict of personalities growing out of a disagreement as to labor policies.'' The instant case presents nothing more.

[9] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its Menomonee Falls, Wisconsin place of business copies of the attached notice marked ''Appendix.''[11] Copies of the notice on forms provided by the Regional Director for Region 30, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''